

Contract Types

Session 1

Concepts



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Contract Type Sessions

Concepts

Cost Reimbursement

Fixed Price

Miscellaneous Types &
Incentives

PREVIEW

Contract Risk Continuum

CONTRACTOR'S PERSPECTIVE

Riskiest ***High Risk*** ***Low Risk*** ***Little/No Risk***

FFP FPIF FPAF CS CR CPAF CPIF T&MCPFF Letter



Completion

Term

Little/No Risk ***Low Risk*** ***High Risk*** ***Riskiest***

GOVERNMENT'S PERSPECTIVE

Agenda

Definitions

Formation to Breach

Related Concepts

2 Major Types

Form of Contract

Loose Ends

CR Paradox?

Commercial

Severability

What is a Contract?

- **Contracts** are designed to provide **written elements** describing **agreements** made between **two or more parties**:
 1. is a **set of promises** to do or not do something...
 2. The university may pay or receive income; however, zero funds may change hands
 3. ... also known as agreements, cooperative agreements, ...etc
 4. ... must be signed by the appropriate contract authority **before** services begin. Once signed by all parties, the document becomes **legally binding**.

(www.edu/bus_serv/Fac_Staff_Info/FACPurchasing/purconovw.html)

- A **contract** is created at law when there is a **mutual exchange of promises** upon reasonably **understandable terms and conditions**.
(www.asu.edu/counsel/manual/definition.html)

- A **written, dated, and signed agreement** between two or more

- A **contract** is a **promise or set of promises** for the **breach** of which the law gives a **remedy** or the **performance** of which the law is some way **recognizes a duty**. [Restatement (Second) of the Law of Contracts]

What is a Contract?

FAR 2.101

“Contract means a **mutually binding legal relationship** **obligating** the **seller** to furnish the supplies or services ... and the **buyer** to pay for them.” (FAR 2.101) {Emphasis added}
It includes **all types of commitments that obligate the Government to an expenditure of appropriated funds and except as otherwise authorized, are in writing.**

In addition to bilateral instruments, contracts include (but are not limited to) **awards** and **notices of awards; job or task letters issued under basic ordering agreements; letter contracts; orders**, such as purchase orders, under which the **contract becomes effective by written acceptance or performance**; and **bilateral contract modifications**.

Contracts do not include grants and cooperative agreements...”

Purpose of a Air Force Contract ?

Spells out Rights and Obligations of the parties under contract terms and conditions

Documents the agreement, i.e., intent of parties

Allocates “Risk” between the parties (Terms & Conditions, Specifications, ?)

The tool for meeting customer requirements

Identifies the “obligation” of Appropriated Funds

Serves as the Baseline to measure Cost, Schedule, & Technical performance

Identifies or provides basis for post-award determinations, e.g. “Scope”

Contract Formation

Four conditions must be met for a **legally enforceable** contract to exist:

1. Agreement

- Requires “offer” and “acceptance”
 - “Meeting of the Minds”

2. Consideration

- Promises must be **“legally sufficient”**
 - Gifts, moral obligations, past consideration...

3. Contractual Capacity

- Insane & minors are not legally competent

4. Lawful Object

- Purpose of contract must be legal

Barriers to Formation?

- **Mutual Mistake**

- If the parties mistakenly agreed on a material aspect of contract performance, is there a “meeting of the minds”?
- More later

- **Revocation or expiration of an offer**

- Is anyone unclear on why contractor's

- **Lack of formality**

- A full employment for bureaucrats? Or ?

- Lapse of time

- Death/incapacity of offeror

And You Thought Contract Writing was Work...

Then Deal with Mistakes (**Formation Issues**)

- FAR 33 Recession or Reformation within PCO authority

“A contract may be reformed or rescinded by the contracting officer if the contractor would be entitled to such remedy or relief under the law of Federal contracts.”

 - **Rescind:** wipes out the existing contract and restores the parties to their situation prior to entering into the contract.
 - **Reform:** makes contract conform to what the parties understood or agreed to
- P.L 85-804 - FAR 50 Extraordinary Contract Actions- Secretary Level Authority to Approve
 - Amendments without consideration
 - Correcting blatant or mutual mistakes
 - Informal commitments
- YOU must work these issues with advice & counsel of an attorney

When Performance Goes Awry

2.101 -- Definitions

- “Termination for **default** ” means the exercise of the Government’s right to completely or partially terminate a contract because of the **contractor’s actual or anticipated failure to perform** its contractual obligations.
 - Traditionally referred to a “Breach” of contract
- “Termination for **convenience** ” means the exercise of the Government’s right to completely or partially terminate performance of work under a contract when **it is in the Government’s interest**.

Necessary Concepts

- “Best Efforts” vs. “Completion”
 - Goes to the nature of the “promise”
 - Best Efforts promises to attempt to meet terms
 - House painter paid on hourly basis
 - Completion promises to, at least, meet terms
 - House painter paid for the job
- Why contract for only Best Efforts?
 - Think of the available remedies if breach occurs.
 - For an artist deliver a handsome portrait in 6 months?
 - The Fool, the Damn Fool, and the Damn² Fool
 - For Boeing deliver 6 GPS Satellites in 5 years?
 - Is foolishness an issue?

Contract Types*

- **Two Broad “Types”**

1. Fixed Price: an agreement where CLIN costs are fixed at time of award

- Govt typically finances performance based on CLIN prices, i.e. deliverables are collateral for financing
- FFP, FPIF, etc
- Typically “Completion” (More later on “form”)

2. Cost Reimbursement: an agreement where CLIN costs are estimated at time of award

- Govt. pays for work completed during performance
- CPAF, CPFF, CPIF, etc
- Typically “Termination”

* See FAR 16 for additional “types”

Contract Form

Completion requires “**performance**”
whereas **Term**

typically requires contractor's “best efforts” to the deliverable(s)
What does this mean? 

Completion: addresses delivery of good or service that must comply with standards stated/reference the contract

-Buy 5 Satellites, software package, CDRs, support equipment. etc.

Term: addresses delivery of a “period of time” or often “level-of-effort”, i.e. hours

-Buy window washing for 1 yr in four 3 month periods

-Buy window washing for 3,500 hours for 1 year

Type & Form

Both contract types may take either “term” or “completion” form

Fixed Price are typically “completion”

• But see FFP Level of Effort

Cost Reimbursement can be either “completion” or “term”

- E.g, CPAF or CPIF completion
 - Example anyone?
- Or, CPFF or CPAF Level-of-Effort

Presumption: Form is “completion” unless stated otherwise

Severable

Funding Implications But Also Contract

Enforcement

- **Contracts can also be broken out as “severable” and “non-severable”**



- **“Severable:” the deliverable(s) can be feasibly subdivided**

- **Supplies or services**
- **12 mo. CPFF Term for window cleaning...only 4 months of**

- **“Non-Severable:” the deliverable(s) cannot be feasibly subdivided**

- **Supplies or services**
- **12 mo. FFP Term for a report on toxic effects...only 4 months of performance finished**

Paradox Lost

If cost contracts are best efforts



**Does a cost reimbursement
“completion” contract have any
meaning?**

“(a) The Government may terminate performance of work under this contract...if...the Contractor **defaults** in performing the contract...“Default” includes failure to make progress in performance so as to endanger performance.” 52.249-6 -- Termination (Cost Reimbursement).



Commercial Contracts

FAR Part 12 and 32

- A separate DoD category to distinguish between goods and services that are **NOT** unique to DoD requirements and those that are not
- FAR 12 shall be used when buying “commercial item(s)”
 - Commercial item defined in FAR 2.101
 - Except for real estate, items that are customarily used by general public, that have no unique governmental purpose, and has been or been offered for sale, lease or license to general public
- Only Firm-Fixed-Price (FFP) or FFP with Economic Price Adjustment can be used
- Significant changes in financing and mandatory clauses

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